MALAYSIAN REPORTS

DATUK SYED KECHIK BIN SYED MOHAMED v. GOVERNMENT OF MALAYSIA & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), and Wan Suleiman F.J.) October 10, 11, & November 20, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 144 of 1977]

Administrative Law — Declaration — Application for declaration that applicant is a person belonging to the State of Sabah and permanent resident of the State of Sabah — Right to remain in State — Entry Permit — Power to cancel entry permit — Declaration of Status as Anak Negeri Sabah — Effect of — Interpretation (Definition of Native) Ordinance (Cap. 64), Sabah — Immigration Act, 1959/63, ss. 10, 14, 66, 71.

Constitutional Law — Right of movement — Special provisions in immigration laws — Borneo States — Federal Constitution, arts. 9, 62 to 74.

Immigration — Federal/state jurisdictions — Applicant permanent resident of Sabah — Entry permit — Immigration Act, 1959/63, ss. 10, 14, 66 & 71.

Native Court — "Anak negeri" — Meaning of native — Interpretation (Definition of Native) Ordinance (Cap. 64) Sabah, ss. 2(1)(d) & 3(2)(3).

Practice and Procedure — Declaratory orders — R.S.C. 1957, O. 25 r. 5.

In this case the appellant applied for a declaration —

(a) that he is a person belonging to the State of Sabah in accordance with section 66(1)(a) of the Immigration Act, 1959/63, Act 155 read in conjunction with section 71(1)(a) of the Act;

(b) that he is a permanent resident of the State of Sabah within the meaning of section 71(1)(a) of the Act;

(c) that his right to remain in Sabah conferred under section 10 of the Act in the form of an Entry Permit issued to him is still subsisting and that he cannot be deprived of that right by the State or any other authority;

(d) that the Entry Permit conferring permanent resident status on him in Sabah cannot lawfully be cancelled under section 14 of the Act.

The learned judge of the High Court declined to grant the declaration sought on the ground that the application was premature and that the matter would be more appropriately dealt with under the special machinery provided by the Immigration Act. The appellant appealed.

Held: (1) the appellant was entitled to a declaration that he belongs to the State of Sabah in accordance with section 66(1)(a) and section 71(1)(a) of the Immigration Act, Act 155 and that he is a permanent resident of Sabah within section 71(1)(a) of the Act;

(2) his right to remain in Sabah conferred under section 10 of the Act in the form of the Entry Permit issued to him is still subsisting but he may be deprived of it by the State or any other authority in the circumstances set out in section 14 of the Act;

(3) the Entry Permit may lawfully be cancelled under section 14 of the Act.

Per Lee Hun Hoe C.J. (Borneo): "The basis of the jurisdiction (for declaratory orders) is O. 25 r. 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion." . . . "In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy."

Cases referred to:-

(1) *Draper* v. *British Optical Association* [1938] 1 All E.R. 115.
(2) *Roesin* v. *Attorney-General* (1918) 34 T.L.R. 417.
(3) *Howard* v. *Pickford Tool Co. Ltd.* [1951] 1 K.B. 417.
(4) *Re Clay* [1919] 1 Ch. 66, 78.
(5) *Joel* v. *Sanges* [1949] Ch. 258.
(6) *Re Barnato* [1949] Ch. 258, 269.
(7) *Ibeneweka* v. *Egbuna* [1964] 1 W.L.R. 219, 224.
(8) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.
(9) *Grant* v. *Knaresborough U.D.C.* [1928] 1 Ch. 310.
(10) *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government & Ors.* [1960] A.C. 260.
(11) *Manggai* v. *Government of Sarawak & Anor.* [1970] 2 M.L.J. 41.
(12) *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors.* [1976] 1 M.L.J. 80.
(13) *Walsh* v. *Lord Advocate* [1956] 3 All E.R. 129.
(14) *Ruislip-Northwood U.D.C.* v. *Lee* (1931) 145 L.T. 208, 214.
(15) *Evans v. Bartlam* [1937] A.C. 473, 480.
(16) *Egarton* v. *Jones* [1939] 3 All E.R. 889, 892.

The following cases were also referred to in argument in *Vine* v. *National Dock Labour Board* [1957] A.C. 488; *Liberian Shipping Corporation "Pegasus"* v. *A. King and Sons Ltd.* [1967] 2 Q.B. 86, 99; *Crowther* v. *Elgood* (1887) 34 Ch. D. 691, 697; *In re Carnavon Harbour Acts* [1937] 1 Ch. 72, 75, 76; *Melstrom* v. *Garner & Ors.* [1970] 2 All E.R. 9, 10; *Burghes* v. *Attorney-General* [1911] 2 Ch. 139; *Curtis* v. *Sheffield* (1882) 21 Ch. D. 1, 3; *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 1 K.B. 536; *Wilkinson* v. *Barking Corporation* [1948] 1 All E.R. 564; *Argosam Finance Co. Ltd.* v. *Oxby* [1964] 3 W.L.R. 774; *Barraclough* v. *Brown* [1897] A.C. 615; *Electrical Industry Workers, Union* v. *Registrar of Trade Unions* [1976] 1 M.L.J. 177; *Golding* v. *Wharton Saltworks Company* (1876) 1 Q.B.D. 374.

FEDERAL COURT.

Peter Mooney (*K.W. Loo* with him) for the appellant.

Fong Seng Yee (Senior Federal Counsel) for the first respondent.

Mohamed Nor bin Mohamed (Senior Federal Counsel) for the second respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Lee Hun Hoe C.J. (Borneo)): The applicant (appellant before us) is a Malaysian citizen by operation of law.

On October 6, 1965, he was sent by the Federal Government to Sabah as Political Secretary in the Federal Ministry of Information and Broadcasting there. Early in 1966 when Tun Mustapha became Federal Minister of Sabah Affairs, he was assigned to him as his Political Secretary. He resigned from that post on August 31, 1967.

From the day of his entry into Sabah he has been continuously resident within Sabah. On June 11, 1967, he applied to the Chief Minister, Sabah, for an Entry Permit for permanent stay in Sabah. Five days later he was granted an Entry Permit to stay permanently in Sabah under section 10 of the Immigration Ordinance, 1959 (now section 10 of Immigration Act 1959/63, Act 155).

On December 22, 1967, he was admitted to the Sabah Bar and has practised law there ever since.

Ever since the grant of the Entry Permit the applicant has been continuously residing within the State of Sabah with his wife and children, owning his own house at No. 1-A, Jalan Puncak, Kota Kinabalu. He has made Kota Kinabalu his permanent place of abode, and has no intention to establish a permanent residence outside Sabah. He has three children born in Kota Kinabalu, two of whom are attending school, the third being too young.

He applied to the Native Court of Kota Kinabalu for a declaration of status as Anak Negeri Sabah (Native of Sabah) within the meaning of the Interpretation (Definition of Native) Ordinance, Cap. 64 Sabah). On January 18, 1971, he was duly declared and admitted as an Anak Negeri. The court order (Exhibit DSK6) stated that the applicant was ordinarily resident in Sabah, was a member of a people indigenous to the federation of Malaysia, had lived as and been a member of a native community for a continuous period of five years immediately proceeding his claim to be a native, had borne a good character throughout that period and his stay in Sabah was not limited under the Immigration Ordinance. Thus it will be seen that the Native Court was of the opinion that he came within the definition of Native of Sabah in section 2(1)(d) of the Ordinance. It should be observed that by section 3(1)(b) a person claiming to be a native may apply to a Native Court to declare that he is a member of a native community, has so lived during any stated period, and while so living has borne a good character or that he is a member of a people named in paragraph (d) of subsection (1) of section 2.

He was appointed Senator on September 29, 1973, representing Sabah affairs for five years (he is no longer one today).

He has acquired immovable properties in Sabah and has interests in the following companies there:

(a) Segama Sdn. Bhd.,
(b) Segama Products Sdn. Bhd.,
(c) Pulau Bohayan Sdn. Bhd.,
(d) Pintasan Sdn. Bhd.,
(e) Zaraland Development Sdn. Bhd. and
(f) Indarasabak Sdn. Bhd.

He has twenty-five employees under his direct employment and their monthly pay amounts to about $22,000.

He has been issued with a Sabah Identity Card in place of his old Peninsular Identity Card. A Sabah Identity Card is only issued to Malaysian citizens of Sabah origin.

A general election was held in Sabah on April 14, 1976, as a result of which there was a change of Government, the new Government being controlled by the Berjaya Party led by Tun Hj. Mohd. Fuad Stephens who became Chief Minister. Immediately after the election it came to the applicant's knowledge that Tun Stephens was contemplating to take steps to expel him from Sabah. A report to that effect appeared in the *Far Eastern Economic Review* on May 7, 1976. Also, before the election Tun Stephens had issued a booklet entitled Berjaya's New Order in Sabah setting out five objects of his party, the fifth being that the applicant would be expelled from Sabah. A rumour that Tun Stephens was contemplating taking steps to expel the applicant immediately after the formation of the Berjaya Party also appeared in the *Asean Review* dated May 8, 1976.

On May 27, 1976, the applicant, citing the Federal Government as the first and the Government of Sabah as the second respondent, by originating summons applied to the court for a declaration:

(a) that he is a person belonging to the State of Sabah in accordance with section 66(1)(a) of the Immigration Act, 1959/63, Act 155, read in conjunction with section 71(1)(a) of the Act;
(b) that he is a permanent resident of the State of Sabah within the meaning of section 71(1)(a) of the Act;
(c) that his right to remain in Sabah conferred under section 10 of the Act in the form of an Entry Permit issued to him is still subsisting and that he cannot be deprived of that right by the State or any other authority;
(d) that that Entry Permit conferring permanent resident status on him in Sabah cannot lawfully be cancelled under section 14 of the Act;

Alternatively —

(e) that the cancellation of the Entry Permit under the powers if any under section 14 would not affect the status of permanent residence of the applicant in Sabah for the purpose of sections 66(1)(a) and 71(1)(a) of the Act.

Be it noted that the application was dated May 27, 1976. The affidavit in support had been affirmed on April 27 and a supplementary affidavit on May 22, 1976, and the facts above recited have been taken from those two affidavits.

Before the hearing, a second supplementary affidavit was affirmed on April 26, 1977. In this affidavit, the applicant alleged that during the previous eleven months the present Sabah Government had taken various steps to harass him politically and economically (Tun Fuad had died in a plane crash and been replaced as Chief Minister by Datuk Harris Salleh).

The applicant alleges that the present State Government —

(1) had in August 1976 cancelled effective from December 31, 1976, the Special Timber Licences belonging to all the timber companies in which he was a shareholder and/or a manager;
(2) had compulsorily acquired the property known as the ZARA PROJECT comprising Provisional Lease Title No. 016290341 belonging to a company called ZARA SDN. BHD. in which the applicant was a shareholder; and
(3) had taken action through the Assistant Collector of Land Revenue, Kota Kinabalu District, to cancel the Draft Titles in respect of two pieces of lands adjacent to the applicant's residence at Signal Hill, Kota Kinabalu, comprising Draft Titles TL 017527007 and TL 017527016, even though

these pieces of lands had already been legally alienated to him and all requisite payments had been made to the Government by him.

Between the date of originating summons (May 27, 1976) and the date of hearing (May 3 and 4, 1977) there was ample time for the State Government to file a counter-affidavit, and yet they did not file any affidavit contradicting any of the facts alleged by the applicant in his three affidavits. Be it noted that in the lower court the Sabah Government was represented by the State Attorney-General himself.

The Federal Government in resisting the application filed an affidavit sworn by Encik Mohd. Osman bin Samsuddin Cassim, Secretary-General, Ministry of Home Affairs, Kuala Lumpur, saying that it was within his knowledge that no proceeding in the Immigration Department, Malaysia, had been taken against the applicant to have him removed from Sabah and that there had been no application from the applicant for a certificate of status under the Act to clarify his status as a citizen belonging to Sabah.

The matter came before the learned trial judge on May 3 and 4, 1977, and in a reserved judgment delivered on June 11, 1977, he declined to grant the declarations sought on the ground that the application was premature and that the matter would be more appropriately dealt with under the special machinery provided by the Immigration Act.

The applicant appealed to us.

The two Governments objected to the court making the declarations sought on the ground that —

(1) the applicant's Entry Permit had not been cancelled;

(2) until then the application was premature and that should the court make the declarations sought (that the Government cannot cancel the permit, etc.) it might cause embarrassment, as subsequently new facts might occur or come to light entitling Government to do so under section 14; and

(3) if and when the Sabah Government cancel the permit, etc., then the applicant can appeal against the cancellation to the Minister of Home Affairs, and only then, after he had exhausted his remedy under the Act, may the applicant come to court to establish his right, if any.

In my view, the applicant has a real fear that he may be expelled from Sabah, and it is desirable for the court to declare whether or not the Federal and State Governments have a right to expel the applicant, so that all parties concerned will know exactly where they stand.

Declarations (a) and (b)

The questions here are whether or not the applicant "belongs" to the State of Sabah under sections 66(1)(a) and 71(1)(a) and he is a permanent resident within section 71(1)(a) of the Act. He claims that he is and if that is so, then clearly under section 66(1)(a) he is entitled to enter Sabah without a Permit or Pass. For the purpose of that section, section 71(1)(a) provides that a citizen shall be treated as belonging to Sabah if —

"he is or has within the preceding two years been a permanent resident in Sabah."

Subsection (2) of section 71 provides:

"... a person shall not be treated for purposes of this section —

(a) as becoming a permanent resident in [Sabah] after not being one, until he has in a period not exceeding five years been resident in the State for periods amounting to three years; or

(b) as being a permanent resident in [Sabah] at any time when under federal law he requires permission to reside there and has not got permission to do so granted without limit of time."

It appears to me that para. (a) only applies to a person who was a permanent resident and then ceased to be one (in other words there was a break in his period of residence) — in which case he would become a permanent resident again if and only if in a period not exceeding five years he had been resident in the State for at least three years. There was no question of the applicant's period of residence having been broken; so, in my view, para. (a) is immaterial.

In my view, only para. (b) is material. It implies that a person who under federal law requires permission to reside in Sabah and has been given permission to do so without limit of time is a permanent resident. The applicant is such a person (since the date of the Entry Permit), he has been in Sabah more than two years, it follows therefore that he is a permanent resident within section 71(2) and also belongs to Sabah within section 71(1)(a).

My conclusion that the applicant belongs to Sabah is reinforced by the declaration of the Native Court that he is a Native of Sabah.

Section 66(1)(a) of the Act does not use the expression "a Native of Sabah", it uses the expression "belongs to [Sabah]." Does a native of Sabah necessarily "belong" to Sabah for immigration purposes? The word "belong" is not defined by the Act, so its dictionary meaning applies, which is, according to the *Concise Oxford Dictionary*, to "be rightly a member of club, coterie, household, grade of society, etc.; be resident in, connected with". In my judgment, the applicant, having been declared by a Native Court of competent jurisdiction a Native of Sabah, is rightly a member of, resident in and connected with the State of Sabah, and thus "belongs" to Sabah. Who could belong to Sabah more than a Native of Sabah? To hold otherwise would be absurd.

The declaration that he was a Native of Sabah was made following a proper application to a Native Court which, under subsection (2) of section 3 of Sabah Cap. 64, has exclusive jurisdiction to entertain and determine the application. By subsection (3) of the same section, the declaration may be appealed as if it were a proceeding or order of the court, and there is no suggestion that such an appeal was ever lodged and that the declaration had been quashed on appeal. Subsection (1) of section 2 provides that wherever the word "native", as a substantive, occurs in any written law in force at the commencement of the Ordinance — subject to exceptions that are not material — or in any written law coming into force after the commencement of the Ordinance, it shall

mean four categories of persons, into one of which falls the applicant as declared by the Native Court. Finally — and this in my judgment is decisive — subsection (4) of section 3 of the Ordinance provides that the final decision on any application made under subsection (1) of section 4 "shall be conclusive evidence for *all* purposes in respect of the matter or matters to which it relates". The decision of the Native Court declaring the applicant a Native of Sabah *is* a final decision (it cannot now be reversed) and is thus conclusive evidence for the purpose of the Immigration law that he is a Native of Borneo.

I do not think that this conclusion of mine would be unfair to Sabah. The applicant has lived in Sabah continuously without a break since 1965, he obtained his Entry Permit unlimited as to time on June 16, 1967, he owned a house in Kota Kinabalu, three of his children were born there, he was admitted to the Sabah Bar and practised law in Kota Kinabalu, he has extensive business interests there and it is not disputed that he does not intend to live outside Sabah, and above all he is a Malaysian citizen by operation of law. My ruling that he belongs to Sabah would not have been made if he had not been a citizen and would not, for instance, apply to the thousands of refugees in Sabah from the Philippines (as to whom there are fears as to their immigration status, according to counsel for the State Government), since section 71(1)(a) of the Act makes clear that for a person to belong to Sabah he must above all be a citizen.

Declarations (c) and (d)

There are two questions here, namely whether —

(1) the applicant's right to remain in Sabah conferred under section 10 by the Entry Permit is still subsisting; and

(2) he can be deprived of it by the State or any other authority.

As regards the first question, neither the Federal nor the State Government contends that his right is not subsisting, and so my answer to the question is in the affirmative.

The answer to the second question is not, however, so easy.

A West Malaysian like the applicant requires an Entry Permit to enter Sabah, section 64(4)(b). This he has. Such an Entry Permit is issued by the Director of Immigration for Sabah, subsection (3) of section 64. The Director is expressly given power to cancel the Permit in the following circumstances: —

(1) if the holder seeks to enter Sabah accompanied by a child whose name is not endorsed on the Permit and who is not otherwise entitled to enter Sabah, section 14(1);

(2) if the Director is satisfied that the Permit was issued as a result of any false representation or concealment of a material fact, section 14(2);

(3) if the Director is satisfied that the holder is a prohibited immigrant, section 14(3).

From the above in my opinion the Director *has* power to cancel the Permit in the circumstances set out above. Whether or not these circumstances exist is a matter which could have been determined in the past or which can be determined today or in the future, and the fact that the Sabah Government has determined that they did not exist in the past or do not exist today, does not, in my view, preclude them from determining in the future that they then exist in light of fresh facts that occur or come to light subsequently.

Declaration (e)

Mr. Mooney for the applicant stated that this declaration did not arise if the court granted the first four declarations, so I refrain from granting this declaration.

Finally, mention should be made of counsel for the two Governments' argument in support of the proposition that this application was premature, and that is that the applicant should first have applied under subsection (6) of section 71 of the Act for a Certificate of Status showing that he belonged to Sabah, which he had not done. With respect, in the circumstances of this case I do not think that he need do so, and in any event if he had done so, then the approving authority would have had to consider it according to law, and if he did that, he would have had to grant the application, the law being as declared in this judgment.

To sum up, I hereby declare: —

(a) the applicant belongs to the State of Sabah in accordance with section 66(1)(a) and section 71(1)(a) of the Immigration Act, Act 155;

(b) he is a permanent resident of Sabah within section 71(1)(a);

(c) his right to remain in Sabah conferred under section 10 in the form of the Entry Permit issued to him is still subsisting, but he may be deprived of it by the State or any other authority in the circumstances set out in section 14; and

(d) that that Entry Permit may lawfully be cancelled under section 14.

The respondents shall pay the costs of this appeal.

Lee Hun Hoe C.J. (Borneo): This appeal is against the refusal of the learned judge to make certain declarations. All the declarations expressly refer to the provisions of the Immigration Act, 1963.

There is no dispute as to the facts. Appellant is a Malaysian citizen born on August 20, 1928 in Alor Star, Kedah. He is an advocate and solicitor. He has always been active in politics, business and social work. On October 6, 1965 he came to Sabah as a political secretary in the Ministry of Information and Broadcasting. In early 1966, when Tun Mustapha was appointed Federal Minister for Sabah Affairs, appellant was assigned to him as his political secretary. Later, Tun Mustapha who was the President of the United Sabah National Organisation (USNO) became the Chief Minister of Sabah. On June 16, 1967, appellant obtained an entry permit. (See page 17 of the Appeal Record). Subsequently, he resigned as political secretary on August 31, 1967. From 1968 to 1972 he was a member of the State Executive Council of USNO. In order to qualify himself as a native within the meaning of the Interpretation (De-

finition of Native) Ordinance (Cap. 64), he obtained a declaration on January 18, 1971 from the Native Court to the effect that he was an "anak negeri" of Sabah. He was made a director of Sabah Foundation and managing director of its six wholly-owned companies. Apart from being a deputy speaker of the State Legislative Assembly from 1975-1976, he was also appointed a senator, representing Sabah from December 25, 1972 to December 14, 1977. Since the issuance of the entry permit, he has continuously resided in Sabah with his wife and three children who were all born in Sabah and two of whom are attending schools in Kota Kinabalu. He owns a residential house and substantial property in Sabah. He employs 25 persons whose total monthly salary is $22,000.

During the 1976 State elections, Bersatu Rakyat Jelata Sabah (Berjaya), a new political party, formed largely by dissentients of USNO, ousted USNO which had ruled Sabah for some eight years. Before the elections, Berjaya issued a manifesto declaring its objectives one of which was to expel appellant from Sabah. In his affidavit dated May 22, 1976, appellant stated that immediately after the elections he learned that Tun Fuad Stephens, President of Berjaya and Chief Minister at the time, was contemplating taking steps to have him expelled from Sabah. In another affidavit dated April 26, 1976, he pointed out that the Government had cancelled his various timber licences, compulsorily acquired a major development project and revoked draft titles of land alienated to him. Some of these matters are pending in court. Articles appearing in the *Far Eastern Economic Review* and *Asean Review* also speculated on his expulsion. Because of harrassment by Government against him politically and economically, he was apprehensive that he might not be allowed to remain in Sabah. Should he be prevented from entering Sabah he would suffer irreparable damage as he would not be able to supervise or carry on his business affairs and to have access to records of companies in which he has interests.

Consequently, by an originating summons dated May 27, 1976 he sought the following declarations: —

(a) that he is a person belonging to the State of Sabah in accordance with section 66(a) of Immigration Act, 1959/63 Act 155 read in conjunction with section 71(1)(a) of Immigration Act, 1959/63 Act 155;

(b) that he is a permanent resident of the State of Sabah within the meaning of section 71(1)(a) of Immigration Act, 1959/63 Act 155;

(c) that his right to remain in Sabah conferred under section 10 of Immigration Act, 1959/63 Act 155 in the form of an Entry Permit issued to him on June 16, 1967 is still subsisting and such right cannot be deprived of him by the State Authority or by any Authority whatsoever;

(d) that the Entry Permit issued to him on June 16, 1967 conferring permanent resident status on him in the State of Sabah cannot lawfully be cancelled in the purported exercise of powers under section 14 of Immigration Act, 1959/63 Act 155;

Alternatively

(e) that the cancellation of the Entry Permit issued to the applicant on June 16, 1967 in exercising the powers, if any, under section 14 of the Immigration Act, 1959/63 Act 155 would not affect the status of permanent residence of the applicant in the State of Sabah for the purposes of section 66(1)(a) and 71(1)(a) of Immigration Act, 1959/63 Act 155 read together.

The application was objected on various grounds, *inter alia*, that it was premature and, therefore, academic and hypothetical. Also, that no threat existed and that there was an alternative remedy. In resisting the application only one affidavit dated December 20, 1976, affirmed by the Secretary-General of the Ministry of Home Affairs was filed. It consists of two paragraphs which read: —

"1. It is within my knowledge that no proceeding in the Immigration Department, Malaysia, has been taken against the Applicant to have him removed from Sabah.

2. There has been no application from the Applicant for a certificate of status under the Immigration Act to clarify his status as a citizen of Malaysia belonging to Sabah."

The learned judge upheld the objection and dismissed the application.

Encik Mooney for appellant complained that the learned judge did not deal with the right which was threatened. He was wrong in law in holding that there was special machinery under the Immigration Act which would give adequate protection to appellant and that this precluded him from exercising his discretionary power. The learned judge merely quoted a passage from *S.A. De Smith* on Judicial Review of Administrative Action, 3rd Edition, page 451 and relied on two cases, namely, *Draper* v. *British Optical Association*[1] and *Roesin* v. *Attorney-General*[2] which were not really applicable. The said passage reads: —

"A plaintiff who is personally interested in the subject-matter of an action may be refused a declaration on the ground that his claim is premature and is to the extent academic or hypothetical. A declaration may be awarded to one with whose legal rights the defendant has already threatened to interfere, but not to one who merely wishes to obtain assurance from the courts that a certain claim cannot be made against him when no such claim has yet been made and the events giving rise to that claim may never occur."

Of the two cases the learned judge considered the latter to be a case in point.

Encik Fong for 1st respondent submitted that the threat of expulsion was absent at the time of application. The Immigration Department has made clear that no proceeding to remove appellant is contemplated. Further, he pointed out that the objectives of the Berjaya manifesto were merely to attract votes. Whether all the objectives would be carried out was another matter. Appellant referred only to Tun Fuad Stephens. Any threat that might be said to come from Tun Fuad Stephens ceased when he died in a tragic air crash on June 6, 1976. As regards the cancellation of entry permit, Encik Fong said appellant had nothing to fear from the Federal Government in relation to his appeal to the Minister. It was not surprising that the learned judge relied on the two cases only as he did not consider any threat to exist. Since Tun Fuad Stephens' death no one has made any threat against appellant. In the absence of any threat the matter was academic. *Howard* v. *Pickford Tool Co. Ltd.*[3] was cited in support. In that case

plaintiff sought a declaration that he need not have to perform his obligations under an agreement. The Court of Appeal held that the court should not be used to answer academic questions. As no one has launched any claim against appellant, he cannot, in the words of Swinfen Eady M.R. in *Re Clay,*[4] say "I wish to have it determined that you have no claim whatever against me." *Re Clay*[4] was applied in the latter case of *Joel* v. *Sanges*[5] where the court declined to make a declaration as to the rights and liabilities which might never come into existence. Almost the same thing was said in *Re Barnato*[6] by Lord Greene M.R. in a passage which reads: —

"Unfortunately, it is not only trustees who may find themselves in that kind of difficulty owing to the uncertain construction of some taxing Act. Any ordinary subject may find himself in precisely the same difficulty, and if these trustees could ask the court to bring the Crown here and insist upon deciding a doubtful question which may or may not arise between them according to events, merely because they want guidance as to the ordering of their affairs, I can see no end to the litigation that would inevitably follow."

It is said that special machinery has been provided under the Immigration Act whereby appellant can apply for a certificate of status. If he has done that it might not be necessary to come to court. Encik Mooney stressed that appellant did not require the certificate as he entered Sabah under the provisions of section 67 or 68 of the Act and had also obtained an entry permit so he was not in any doubt as to his status. Further, appellant has also been issued with a Sabah identity card. The certificates are meant for doubtful cases. At any rate such a certificate is not a remedy.

Encik Mohamed Nor for 2nd respondent said no event had taken place to justify appellant's fear that his right, if any, to remain in Sabah was being threatened. He submitted that the learned judge was right to rule that the application was premature. There were two aspects to the question of prematurity, namely, non-occurrence of events and the issues raised in the application were academic and hypothetical at the time. He associated himself with what Encik Fong said regarding the Berjaya manifesto. As to the declared intent of Berjaya, he submitted that it could never be said to be the declared intent of the Government of the day. The threat emanated from Tun Fuad Stephens personally. The State Government has not done anything or uttered a single word about the matter. Hence, there is no reason for the State Government to reply to an allegation made by someone. It was possible that appellant's fear was fueled by sensational articles in periodicals such as *Asean Review* and *Far Eastern Economic Review.* These were foreign publications over which the State Government had no control. As the validity of the entry permit was not in question, the matter was clearly academic and hypothetical. Once the validity of the entry permit was questioned, no doubt other issues would arise. These issues were not before the court, so no decisions could be made. Further, it was submitted that it would cause embarrassment if the court were to make a declaration and later certain facts not before the court came up before the State authority compelling it to cancel the permit and refuse appellant entry into the State. Even if the court should decide on the facts it could make the declaration, the power of the State authority to cancel or revoke an entry permit remains unfettered. The court should avoid a situation where there would be two conflicting decisions. If his entry permit were cancelled he could appeal to the Minister. As none of appellant's rights had been infringed, the learned judge was right to dismiss the application.

Article 9 of the Federal Constitution which provides that every citizen has a right to move freely throughout the federation and to reside in any part of the federation, is, however, subject to the special provisions of the immigration laws relating to the two Borneo States. Insofar as immigration is concerned, the Borneo States have full control. This arrangement was agreed before Malaysia and embodied in the Report of the Inter-Governmental Committee, 1962. Subject to certain exceptions, admission to the Borneo States whether from within or without Malaysia cannot be granted to any person without the approval of the State concerned. The report also makes clear that no person who resides temporarily in the State on account of his official duty as a federal officer shall be allowed to belong to the State or to be a citizen of Malaysia on account of connections with the State. The Immigration Act, 1963 which gives each of the Borneo States wide powers to control entry into and residence in the State can only, as to those provisions, be changed with the concurrence of the State concerned. See Article 161E. The Constitution permits the Borneo States through Federal law which has been entrenched, so that each State's concurrence is required for any change, to control entry into either State of citizens from elsewhere in Malaysia. Part VII of the Act covering sections 62 to 74 contains the special provisions for the Borneo States. We are concerned with some of these special provisions.

The Borneo States are, with certain exceptions, permitted to treat an ordinary Malaysian from Peninsular Malaysia seeking entry into either State as if he were a non-citizen. The exceptions laid down in sections 66 to 68 are as follows: —

1. He belongs to the State;
2. He is a member of the Federal Government, or of the Executive Council or Legislative Assembly of the State;
3. He is a Judge of the Federal Court or of the High Court;
4. He is a member of any public service of the Federation or of the public service of the State or of a joint public service serving in the State;
5. Wife and children under 18 of the above four categories of persons;
6. He enters the State for sole purpose of engaging in legitimate political activity;
7. He is one whose entry into the State is temporarily required by Federal Government in order to enable that Government to carry out its constitutional and administrative responsibilities.

Except for (7) the burden of proof that he is entitled to enter the State is on him.

In construing the Immigration Act, 1963 two propositions of law are clear and not disputed. First, if a person belongs to Sabah he is entitled as of right to enter and reside in it without any permit or pass, section 66(1)(a). Secondly, a person belongs to Sabah if he is a citizen and he is or has within the preceding two years been a permanent resident in Sabah, section 71(1)(a). To be treated as permanent resident a person has to acquire certain minimum residential qualification. A person can become a permanent resident if he has been resident in the State for three years within the preceding five years, section 71(2)(a). A person is not, however, a permanent resident if his stay is limited in period, section 71(2)(b). If a person is a citizen and ordinarily resident in the State on Malaysia Day, he is treated as belonging to the State, section 71(5). Appellant's position is different as he came into the State long after Malaysia Day under an entry permit. The *Oxford English Dictionary* defines the word "reside" to mean "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." The word "residence" implies some degree of permanence and continuity. The submission of appellant is that an entry permit gives the right of entry without limit of stay. Such a permit cannot be cancelled except in certain circumstances, as provided by the Act, such as (a) seeking to enter accompanied by an unauthorised child, section 14(1); (b) obtaining a permit by false representation or concealment of a material fact, section 14(2); or (c) the permit holder is a prohibited immigrant, section 14(3). It is appellant's case that none of the circumstances applies to him.

Much was made of the fact that appellant did not apply for permit in the proper prescribed form (i.e. Form 4 as set out in the Second Schedule of the Immigration Regulations, 1963) which requires certain particulars to be given. Appellant merely wrote to the Chief Minister applying for the entry permit. It was issued by the Controller of Immigration. Under section 14(4) if a person has entered the State on a permit and the Director-General is satisfied that any material statement made in or in connection with the application for that permit was false or misleading he may declare the presence of that person as unlawful. Under the special provisions the powers and discretions vested in the Director-General is exercisable by the Director of the State. Bearing in mind that under section 62 the "State Authority" is the Chief Minister and under section 65 the Director has to comply with the direction given to him by the "State Authority" it is difficult to see how the Director can refuse to issue the permit to appellant. If the form was not in order it was clearly the duty of the immigration authority to say so and to get appellant to use the proper prescribed form before issuing him with the permit. This was not done. In my view it would be wrong after more than ten years to turn round and say that the application was not in order after having issued the permit. If it took over ten years to find the application was not in order then something must be wrong with the efficiency of the immigration authority. Once the permit was issued it would not be unfair to assume that the immigration authority was satisfied that the application was in order otherwise no permit could be issued.

Numerous authorities were cited by the parties in support of their submissions to show the manner in which the discretion should be exercised. I do not think it necessary to refer to all of them for the purpose of this judgment. The basis of the jurisdiction is Order 25 rule 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion. In *Ibeneweka* v. *Egbuna*[7] Viscount Radcliffe in giving the decision of the Privy Council stated: —

> "The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealously,' with 'extreme caution,' with 'the utmost caution.' These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration."

It is the submission of appellant that he has no other remedy of establishing his right to reside in Sabah. The declaration sought is not as to his future right but as to his present right. There has been a threat to his right by official statement of the party in power. The threat has never been denied or withdrawn. A political party can only realise its objectives if it were in power. He need not have to wait for something to happen before seeking the court's protection. See *Dyson* v. *Attorney-General*;[8] *Grant* v. *Knaresborough U.D.C.*[9] and *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Ors.*[10] A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy. *Zamir* on "The Declaratory Judgment" at page 206 states: —

> "It is not uncommon for persons to confront an allegation that at some future date they will become liable to another, or that they will not have a certain right which they expect to come into existence, or that their existing right will then expire. They may in such circumstances bring a declaratory action to remove the cloud from their future rights."

Under section 14(5) a person whose entry permit is cancelled may appeal to the Minister whose decision is final. It is the contention of appellant that his rights in respect of the first two declarations do not depend on the entry permit. By virtue of residential qualification he belongs to the State and is a permanent resident irrespective of the existence of the entry permit. He is not questioning the extent or exercise of the Director's power. I do not agree with the submission that the Director has no power to

cancel his permit. As the Director may have to act on the direction of the State Authority in cancelling the entry permit, an appeal to the Minister may be a futile exercise. The reason is that under section 65(2) the Minister "shall not allow the appeal without the concurrence of the State Authority."

Unlike *Manggai* v. *Government of Sarawak & Anor.*[11] and *Metal Industry Employees Union* v. *Registrar of Trade Union & Ors.*[12] the present case is not a case where something has happened for which there is a remedy which appellant has not utilised. It is a case where appellant fears that the threat may become a reality and seeks a declaration to protect his right. As the distinguished American scholar, *E.M. Borchard* on "Declaratory Judgments", 2nd Edition, page 20, referring to those cases where no traditional wrong has yet been committed or immediately threatened, says "a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom and his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace."

Shortly stated, respondents contended that the court had no jurisdiction to grant the relief claimed and, alternatively, if it has jurisdiction, then it ought to refuse to make any of the declarations in the exercise of its discretion. Where, as in this case, there is no dispute as to facts and the question of rights depends solely on the construction of the immigration legislation, the issue of originating summons is a convenient procedure for the determination of that question. In *Roesin's* case[2] Swinfen Eady M.R. said: —

"It was an abuse of the process of the court for a foreigner resident here to come and ask for a declaration whether he was or was not a subject of any particular State, not then having received any notice differentiating him from any other foreigner temporarily commorant here...."

Relying on the above passage the learned judge in effect expressed the view that although the case concerned a foreign resident the distinction made no difference in principle to a case involving a citizen. I think the distinction is significant. It cannot be said to be an abuse of process of the court for a citizen to ask for a declaration concerning his rights. Regulation 1(3) of the Immigration Regulations, 1963 provides that a person entitled in Sabah to the benefit of section 10 of the Immigration Act, 1963 shall, as regards entry into that State, be treated as being a citizen and not as being an alien. In recent years many proceedings involving national service matters have been determined by declaratory proceedings. See *Walsh* v. *Lord Advocate.*[13]

In *Ruislip-Northwood U.D.C.* v. *Lee*[14] plaintiff sought the ruling of the court on a definite, concrete and existing dispute. The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration. Nowadays, the courts seldom refuse to make orders on ground that it is premature to consider the question. As Greer L.J. pointed out that it had been for years the practice to know and determine claims for declaration of rights where there was a real and not a fictitious or academic question involved in order that the parties might know what course to take without running the risk of finding themselves liable to damages. Indeed, we consider that a court should make it possible to settle real disputes immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.

There are three main issues in this case. The first is whether appellant belongs to Sabah or is entitled to remain there by virtue of the entry permit. Secondly, whether there is a threat to appellant's position. Thirdly, whether appellant has any real interest in obtaining the declarations. It is right that the court should consider whether the declarations, if granted, will serve any purpose and whether it will cause embarrassment, inconvenience or injustice to other persons. Unless the court is satisfied with the answers to these matters, it should decline to make the declarations. Even though appellant may have established his rights the court may in the exercise of its discretion refuse to make any of the declarations having regard to a variety of considerations. It was said that the learned judge had not kept in his mind the two issues and unless he did he would not be able to resolve the other issue properly in the exercise of his discretion. In every case involving discretion there is invariably a number of considerations which a judge ought to have in mind for the purpose of enabling him to exercise his discretion. Normally, an appellate court will not interfere with the judge's discretion but will do so if the judge is wrong in law or when the decision will result in injustice being done. See *Evans* v. *Bartlam.*[15] It is also the duty of an appellate court to interfere where a judge has taken into consideration something which he ought not to have taken into consideration or has omitted to take into consideration something which he ought to have taken into consideration or when on the facts it is satisfied and convinced that the discretion has been wrongly exercised. See *Egerton* v. *Jones.*[16]

I cannot in the circumstances refrain from alluding to the facts that appellant had spent a great part of his life in Sabah, made a name for himself and contributed his service to the State. The significance of the declaration made by the Native Court that appellant is an "anak negeri" of Sabah should not be overlooked. Such a declaration would only be made if appellant was able to satisfy the court of his being a member of a people indigenous in Malaysia, his residence in Sabah, his living as a member of a native community for a continuous period of five years immediately prior to his claim and of his good character. Furthermore, another consideration was that his stay was not limited under the Immigration Ordinance. See section 2(1)(d) of the Interpretation (Definition of Native) Ordinance (Cap. 64). Section 3(2) of the Ordinance makes clear that the Native Court shall have exclusive jurisdiction to entertain and determine such application and to make such declaration. Section 3(3) of the Ordinance provides that there may be an appeal against such declaration as if it were a proceeding or order of the court. Any appeal against such decision would be governed by the provisions of the Native Courts Ordinance (Cap. 86).

As there has been no appeal the declaration is binding for section 3(4) of Cap. 64 states that such declaration made shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates. The implication is that appellant is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native he belongs to Sabah.

I would like to go back to the entry permit. As stated, the validity of the entry permit is not in issue. This means that the appellant's right to remain in Sabah is still subsisting. There is no doubt that the Director has power to cancel the permit in the circumstances set out earlier. Whether the circumstances exist depend not only on existing facts but also on facts which may come to light subsequently. However, appellant's right to enter and reside in Sabah does not depend solely on the entry permit. Even if the entry permit were cancelled he can still claim to belong to Sabah by virtue of the Native Court declaration. I am not aware of any law which permits the State Government to expel a native belonging to the State or to extinguish his status which has been acquired according to law. Having regard to the law applicable, my conclusion is, on the undisputed facts, that appellant belongs to Sabah.

I would allow the appeal and grant the first four declarations in terms as stated by the Lord President. The fifth declaration which is in the alternative need not be considered. Appeal allowed with costs both here and the court below.

Wan Suleiman F.J. concurred.

Appeal allowed.

Solicitors: *W.K. Loo & Co.*

MOHAMED MUSTAFA v. KANDASAMI

[F.C. (Raja Azlan Shah, Chang Min Tat & Syed Othman F.JJ.) December 5, 6, 1978 & February 2, 1979]

[Penang — Federal Court Civil Appeal No. 126 of 1978]

Contract — Written document — Whether creating a lease or a licence — Premises used as eating shop — Construction of document — Evidence Act, 1950, ss. 91 and 92.

Landlord and Tenant — Whether agreement created a lease or licence.

In this case the respondent alleged that he had been given a tenancy of the premises to be used as an eating house. There was a written agreement between the parties which recited that the "lessor wishes to lease to the lessee the said business of an eating house together with the use of the ground floor" but which stated that the "lessor hereby lets to the lessee the ground floor only of the said premises together with the full right and liberty to the Lessee to carry on the business of an eating house on the said premises". A clause in the document stated that the relationship of landlord and tenant did not exist between the parties. The respondent had sought a declaration that he was the tenant of the said premises and was protected under the Control of Rent Act, 1966. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

Held, allowing the appeal: it was reasonably clear in this case that what was given in the document was a licence. The claim of the respondent must be dismissed and he should give up possession of the premises to the appellant.

Cases referred to:-

(1) *Tyagaraja Mudaliar & Anor.* v. *Vedathanni* [1936] M.L.J. 79; A.I.R. 1936 P.C. 70.
(2) *Cobb* v. *Lane* [1952] 1 All E.R. 1201, 1202.
(3) *Errington* v. *Errington* [1952] 1 All E.R. 149, 155.
(4) *Booker* v. *Palmer* [1942] 2 All E.R. 674, 677.
(5) *Isaac* v. *Hotel de Paris Ltd.* [1960] 1 All E.R. 348, 352.
(6) *Pong Kwee Kwei* v. *Tan Sai Kuy* [1972] 2 M.L.J. 48.
(7) *Chin See Lian v. Ng Wan Pit* [1973] 1 M.L.J. 115.
(8) *Mayor, Aldermen and Burgesses of the Borough of Southgate* v. *Watson* [1944] 1 All E.R. 603.
(9) *Methani* v. *Perianayagam* [1961] M.L.J. 5.
(10) *E.H. Lewis and Son Ltd.* v. *Morelli* [1948] 2 All E.R. 1023, 1024.
(11) *Indo-Australian Trading Company Ltd.* v. *Krishnasamy* [1973] 1 M.L.J. 87, 89.
(12) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, 1389.
(13) *Goh Gok Hoon* v. *Abdul Hamid & Anor.* [1967] 1 M.L.J. 36, 40.
(14) *Carter* v. *S.U. Carburettor* [1942] 2 K.B. 288, 291.
(15) *Mancroft Wagons Ltd.* v. *Smith* [1951] 2 K.B. 496, 501.
(16) *United India Fire and General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118, 122.
(17) *Addiscombe Garden Estates, Ltd.* v. *Crabbe* [1958] 1 Q.B. 513, 522; [1957] 3 All E.R. 563, 565.
(18) *Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412.
(19) *Wong Yew Chee* v. *Yong Yong Hee* [1979] 1 M.L.J. 131.
(20) *Shell Mex* v. *Manchester Garages* [1971] 1 W.L.R. 612, C.A.
(21) *Rajenback* v. *Mamon* [1955] 1 Q.B. 283; [1955] 1 All E.R. 12.
(22) *Johnson & Anor.* v. *Moreton* [1978] 3 W.L.R. 538.
(23) *Aldrington Garages* v. *Fielder* (1978) 247 Estates Gazette 557, 559.

HIGH COURT.

R.K. Sharma (*Abu Hanifah* with him) for the plaintiff/respondent.

Thilliamuthu for the defendant/appellant.

Cur. Adv. Vult.

The following judgment was delivered on June 30, 1978:

Gunn Chit Tuan J.: This action by the plaintiff was commenced by a writ of summons dated September 11, 1971. In the statement of claim dated September 24, 1971 he claimed against the defendant for —

(1) A declaration that the plaintiff is a tenant of the defendant entitled to protection of his tenancy under the provision of the Control of Rent Act, 1966, in respect of such parts of the premises No. 43 Penang Street, Penang as are rented to the plaintiff by the defendant, i.e.
   (a) the whole of the ground floor of premises No. 43 Penang Street, Penang.
   (b) a room on the first floor of the said premises including the right to common use of the hall and other conveniences on the first floor by the plaintiff, the members of his family and his customers of the eating shop.
(2) Damages for breach of terms of oral agreements made in or about the early part of May 1970 and written agreement dated 31st day of July (*sic*) and made between the plaintiff of the one part and defendant of the other.